Attorney General
1275 WEST WASHINGTON
Phoenix, Arizona 85007
Robert K. Corbin

January 4, 1991

The Honorable Lela Steffey
Arizona State Representative
State Capitol - House Wing
Phoenix, Arizona 85007

Re: I91-002 (R90-163)

Dear Representative Steffey:

In your letter of December 7, 1990, you requested our opinion concerning the meaning of the phrase "[a] medical procedure with respect to an abortion" in A.R.S. § 36-2152(A).

The constitutionality of A.R.S. § 36-2152(A) is the subject of pending litigation in Planned Parenthood of Southern Arizona, et. al. v. Neely, et al., No. 89-CV-489, in the United States District Court for the District of Arizona. In that case, the United States District Court issued a preliminary injunction enjoining enforcement of A.R.S. §§ 36-2152 and 2153 finding that plaintiffs had raised serious constitutional questions by their claims that A.R.S. §§ 36-2152 and 2153 fail to provide an adequate, expedited judicial waiver procedure and that the language in the statutes is unconstitutionally vague.

Generally, it is our policy not to render an opinion on a matter that is the subject of litigation. Ariz. Att'y Gen. Op. 181-137. However, this self-imposed policy of restraint may be overridden by more important policy considerations which we believe are present in this case.

No Arizona court has construed A.R.S. §§ 36-2152 and 2153. In determining the facial constitutionality of state statutes, a federal court must consider any authoritative limiting construction placed on statutes by Arizona state courts or enforcement agencies. Broadrick v Oklahoma, 413 U.S. 601, 618, 37 L. Ed. 2d 830, 93 S.Ct. 2908, 2918 (1973). This is because a state law will not be facially invalidated as

overbroad or vague if it is readily susceptible to a narrowing construction that would make it constitutional. Virginia v. American Bookseller's Ass'n, Inc., 484 U.S. 383, 397, 108 U.S. 636, 645 (1988); Yniguez v. Mofford, 730 F.Supp. 309, 315 (D. Ariz. 1990). See also Planned Parenthood of C. & N. Ariz., 718 F.2d 938, 948 (9th Cir. 1983) (citing Smith v. Goguen, 415 U.S. 566, 580 n. 29 (majority opinion) & 597 (Rehnquist, J., dissenting) 94 S.Ct. 1242, 1251 n. 29 & 1259, 39 L. Ed. 2d 605 (1974) for authority for looking to opinions of the state attorney general for guidance in determining vagueness of statute.)

Thus, we feel that it is appropriate to provide guidance as the chief law enforcement office in Arizona by giving our official interpretation of the meaning of the phrase "medical procedure with respect to abortion". See Virginia v. American Bookseller's Ass'n, Inc., 108 S.Ct. at 645 (Stevens, Jr., concurring opinion) (questioning the wisdom of the majority's reliance upon an "advocate's concession during oral argument" as "equivalent to a formal commitment").[1/] Moreover, in addition to providing guidance to the legislature which may be contemplating an amendment to A.R.S. § 36-2152, our interpretation will provide guidance to and may alleviate concerns of medical personnel whose conduct may be subject to prosecution in the event the preliminary injunction is lifted or reversed on appeal. It is clear that medical personnel will not be immune from prosecution for acts performed while the preliminary injunction is in effect if the preliminary injunction is later lifted or reversed on appeal. Edgar v. Mite Corp., 457 U.S. 624, 649-50, 73 L. Ed. 2d 269, 102 S.Ct. 2629, 2644 (1981).

Having concluded that it is appropriate for us to address the issue raised in your letter, we now turn to consideration of the language in A.R.S. § 36-2152(A). That subsection provides in pertinent part:

> A medical procedure with respect to an abortion shall not be performed on an unmarried or unemancipated minor unless one of her parents or her legal guardian gives written consent to the treating physician for an abortion.

Because the legislature used the term "medical procedure with respect to abortion," instead of simply "abortion," we utilize rules of statutory interpretation to determine whether the

---

1. Clearly, this opinion, rendered pursuant to A.R.S. § 40-193(A)(7) in answer to a legislator's request is a "formal commitment" and not merely an "advocate's concession".

legislature intended to require consent for procedures other than abortion procedures under A.R.S. § 36-2152.

The Arizona Supreme Court recently reiterated the following rules of statutory construction:

> In statutory interpretation the primary principle is to determine and give effect to the legislative intent behind the statute. Calvert v. Farmers Ins. Co. of Arizona, 144 Ariz. 291, 697 P.2d 6894 (1985). To find legislative intent we consider the context of the statute, the language used, the subject matter, the historical background, the effects and the spirit and purpose of the law. Arizona Newspapers Ass'n v. Superior Court, 143 Ariz. 56, 694 P.2d 1174 (1985).

Martin v. Martin, 156 Ariz. 452, 752 P.2d 1038, 1043 (1988). It is our opinion that pursuant to the above rules of statutory construction, the meaning of "medical procedure with respect to abortion" is limited to abortion procedures.[2/]

First, the term in A.R.S. § 36-2152 must be read in conjunction with the exceptions provided in A.R.S. § 36-2152(B). Subsection 36-2152(B)(1) provides an exception to the parental consent provision in A.R.S. § 36-2152(A) if the minor receives a judicial order that she is mature enough to make "the abortion decision" or if her best interests would be served by obtaining "an abortion" without parental consent. Subsection 36-2152(B)(2) provides an exception to parental consent if there is an emergency need for "an abortion." Moreover, A.R.S. § 36-2153(A) which sets forth the requirements for the parental consent waiver proceedings refers only to the "abortion decision" and obtaining "an abortion". Thus, the exceptions in subsections 36-2152(B)(1) and (2) to the parental consent requirement in A.R.S. § 36-2152(A) are limited to abortions; i.e. there is no exception for medical procedures other than abortions.

---

2. "The term 'abortion procedure' is commonly used to refer to the actual operation performed by medical personnel in carrying out the abortion." Planned Parenthood of C. & N. Arizona v. Arizona, supra, 718 F.2d at 948, citing Roe v. Arizona Board of Regents, 113 Ariz. 178, 180, 549 P.2d 150, 152 (1976).

It is absurd to suggest that diagnostic procedures generally such as pregnancy tests, sonography or amniocentesis would be included within the term "medical procedure with respect to abortion" in A.R.S. § 36-2152(A) yet not subject to the exception provisions in A.R.S. §§ 36-2152(B)(1) and (2). "In construing a statute, courts should give the statute a sensible construction which will accomplish legislative interest and purpose, and which will avoid absurd results." State v. Flores, 160 Ariz. 235, 772 P.2d 589 (App. 1989).

Second, the legislative history of the term "medical procedure with respect to abortion" indicates that the legislature sought first parental notification then parental consent for abortion procedures and not other medical procedures. The term "medical procedure with respect to abortion" was used in the predecessor to A.R.S. § 36-2152 (former A.R.S. § 36-2512, 1982 Ariz. Sess. Laws, Ch. 184, § 2), which required parental notification. The minutes of the Committee on Health, Welfare & Aging which considered House Bill 2370 (Ch. 184, § 2, 1982 Ariz. Sess. Laws) show the legislature's concern with parental notification of an abortion to be performed on their child:

> Representative Meredith, sponsor of the bill, explained that the bill was drafted in accordance with two recent Supreme Court decisions, and provides for a parental right to know that their child is being operated on. 'Abortion is a medical procedure similar to other surgical procedures for which the statutes require parental notification.'

Minutes of the Committee on Health, Welfare and Aging, April 5, 1982, at 2.

It also appears from these legislative committee minutes that the phrase "medical procedure with respect to abortion" was used to distinguish abortion procedures from all other surgical procedures performed on minors since parental consent was required for surgical procedures under existing law pursuant to A.R.S. § 36-2271.

When Senate Bill 1011 (Ch. 212, 1989 Ariz. Sess. Laws, codified at A.R.S. § 36-2152) was considered by the legislature, there was no indication that it was concerned with parental consent for any medical procedure other than abortions. See Minutes of Committee on Judiciary, April 17, 1989 and Transcript of Committee of the Whole Floor concerning Senate Bill 1011, April 26, 1989.

Third, in determining the meaning of statutory language, the title of the act may aid in the interpretation. State v. Barnett, 142 Ariz. 592, 597, 691 P.2d 683, 688 (1984)

The title of A.R.S. §§ 36-2152 and 2153 reads, in pertinent part, "REQUIRING PARENTAL CONSENT BEFORE A MINOR MAY HAVE AN ABORTION." Ch. 212, 1989 Ariz. Sess. Laws.

In summary, it is our conclusion in accordance with the rules of statutory construction utilized by the Arizona courts, the phrase "[a] medical procedure with respect to an abortion" means "abortion procedures".

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

1188w